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TENAGA NASIONAL BHD v. C & T PLASTIC ENTERPRISE SDN BHD

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL APPEAL NO: 12BNCVC-99-12-2014]
4 AUGUST 2015

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UTILITIES: *Electricity – Meter tampering – Claim for – Whether claim sustainable – Whether there was prior prosecution and conviction against defendant for offence under s. 37 Electricity Supply Act 1990 – Whether a mandatory requirement – Whether notice under s. 38(3) defective – Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd*

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CIVIL PROCEDURE: *Appeal – Appeal against decision of Sessions Court – Meter tampering – Claim for – Whether there was prior prosecution and conviction against defendant for offence under s. 37 Electricity Supply Act 1990 – Whether a mandatory requirement – Whether decision in Tenaga Nasional Bhd v. Ee Lian Plastic Industries (M) Sdn Bhd decided before appeal – Whether decision of trial court set aside – Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd*

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CIVIL PROCEDURE: *Appeal – New point raised on appeal – Whether allowed – Whether issue raised in pleadings – Rules governing pleadings – Whether defendant precluded from raising new issues at appeal stage*

E

CIVIL PROCEDURE: *Pleadings – Facts not pleaded – Appeal to High Court – New point raised on appeal – Whether allowed – Defence to be pleaded specifically in statement of defence – Whether issue raised in pleadings – Whether defendant precluded from raising new issues at appeal stage – Rules of Court 2012, O. 18 r. 8(1)*

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The plaintiff was a supplier of electricity. On 21 October 2011, the plaintiff's technicians conducted an inspection at the defendant's premises and found evidence of meter tampering. A notice under s. 38(4) of the Electricity Supply Act 1990 ('ESA') was issued which required the defendant to pay a sum of RM503,167.94 for loss of revenue and expenses incurred as a result of the tampering. However, despite several reminders, the defendant refused to pay the said sum and the plaintiff filed a claim in the Sessions Court. The defendant denied liability on the ground that the plaintiff's claim was not maintainable since it failed to satisfy the pre-condition as set out under s. 38(3) of the ESA which required that the defendant must have been charged and convicted of any offence under s. 37(1), 37(3) or 37(14) and other grounds. Further, the defendant argued that there was no evidence to show that the meter installation had been tampered. The Sessions Court Judge found that there was evidence of tampering and the plaintiff had proved the sum claimed as damages. However, citing *Tenaga Nasional Bhd*

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v. Ee-Lian Plastic Industries (M) Sdn Bhd ('*Ee-Lian*'s case'), the trial judge decided that a prior prosecution and conviction for an offence under s. 37 of the ESA was a *sine quo non* to bring a claim under s. 38(3). Since there was no evidence to show that there was a prior prosecution and conviction against the defendant, the claim could not be sustained. Dissatisfied, the plaintiff filed an appeal against the decision of the Sessions Court. The issues that arose for consideration were (i) whether a prior prosecution and conviction was a mandatory requirement to institute a claim under s. 38(3) of the ESA; and (ii) whether the defendant was entitled to raise a new point in relation to the defectiveness of the s. 38(4) notice.

Held (allowing appeal with costs):

(1) The Court of Appeal's decision in *Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd* ('*Ichi-Ban*'s case') was delivered after the trial judge delivered her decision. In *Ichi-Ban*'s case, it was decided that a prior prosecution and conviction was not a pre-requisite under s. 38 of the ESA. As such, *Ee-Lian*'s case was set aside by the Court of Appeal. (para 13)

(2) It is not open for a trial judge to consider and pronounce upon issues not placed before him in the pleadings either in their original form or by way of amendment. A litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance as he was not exempted from the rules governing pleadings. This rule is also predicated on the principle of natural justice. Thus, the defendant was precluded by the rule against raising new issues at the appeal stage. (paras 15 & 16)

(3) Based on O. 18 r. 8(1)(a) and (b) of the Rules of Court 2012, the defendant's allegation that the s. 38(4) notice was defective had to be pleaded specifically in the statement of defence. It would be manifestly unjust for the defendant to succeed in this court on a point not canvassed before the Sessions Court. (paras 17-19)

Case(s) referred to:

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***

Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***

Hj Mohamed Dom v. Sakiman [1955] 1 LNS 26 HC ***(refd)***

Hoecheong Products Co Ltd v. Cargill Hong Kong Ltd [1995] 1 WLR 404 ***(refd)***

Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd [2014] 1 LNS 750 CA ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd [2015] 6 CLJ 751 CA ***(refd)***

Tenaga Nasional Bhd v. Ee-Lian Plastic Industries (M) Sdn Bhd [2013] 2 CLJ 697 HC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Yu-AI Food Industries Sdn Bhd v. TNB (Unreported) ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, ss. 37(1), (3), (14), 38(3), (4)
Rules of Court 2012, O. 18 rr. 8(1)(a), (b)

For the appellant - Prithi Mala Verma; M/s Prithi Junainah & Assocs
For the respondent - Chiang Woei Chien; M/s Chiang Chambers

[Appeal from Sessions Court, Ipoh; Civil Action No: B52-19-04-2013]

Reported by Kumitha Abd Majid

JUDGMENT

SM Komathy JC:

[1] This is the plaintiff's appeal against the dismissal of its claim under s. 38(3) of the Electricity Supply Act 1990 ("ESA") for loss of revenue as a result of the tampering of the meter installations at the defendant's premises. The learned Sessions Judge dismissed the claim on the ground that the claim had been instituted in breach of s. 38 as there was no prior prosecution and conviction of the defendant.

The Facts

[2] The underlying facts are not in dispute. The plaintiff is a supplier of electricity and the defendant a consumer of electricity *via* account no. 0210-00125231-08 for premises addressed at Plot 17, Jalan Johan 2/1, Kawasan Perindustrian Pengkalan 11, 31350, Pusing, Perak.

[3] The plaintiff's technicians conducted an inspection at the defendant's premises on 21 October 2011, and found evidence of tampering of the meter installations. The plaintiff issued a notice under s. 38(4) of the ESA requiring the defendant to pay a sum of RM503,167.94 for loss of revenue and expenses incurred caused by the tampering of the meter installation despite reminders and a legal notice, the defendant refused to pay the sum claimed by the plaintiff.

[4] Whereupon, the plaintiff instituted a claim for RM503,167.94 for loss of revenue and other incidental costs suffered under s. 38(3) of the ESA. The defendant denied liability on the ground that the plaintiff's claim was unmaintainable as it had failed to satisfy the pre-condition set out in s. 38(3) which required that the defendant must have been charged and convicted of any offence under ss. 37(1), 37(3), or 37(14) and other grounds.

[5] The plaintiff's claim was litigated and six witnesses were called at the trial. The plaintiff called five and the defendant one. In his submission, the defendant contended that there was no evidence to show the meter installation had been tampered and that that was a prior prosecution and conviction under s. 37 to entitle the plaintiff to bring this action under s. 38(3).

Decision Of Trial Judge

[6] The Sessions Judge found there was evidence of tampering and that the plaintiff had proved the sum claimed as damages. However, she held that a prior prosecution and conviction for an offence under s. 37 was a *sine quo non* to bringing a claim under s. 38(3). In her grounds of judgment, she noted that there were two conflicting line of authorities on this point, and expressed her preference for the view that a prior prosecution and conviction was a prerequisite. She cited the decision of the High Court in *Tenaga Nasional Bhd v. Ee-Lian Plastic Industries (M) Sdn Bhd* [2013] 2 CLJ 697, to support her finding. She held that as there was no evidence to show there was a prior prosecution and conviction against the defendant, the claim could not be sustained, and dismissed it.

Arguments on Appeal

[7] During the hearing of the appeal, the plaintiff argued that the Sessions Judge had erred in law in holding that a prior prosecution and conviction was a prerequisite to the bringing of an action under under s. 38(3) can be made. The plaintiff cited a long line of cases, including *Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Berhad* [2014] 1 LNS 750, *Claybricks & Tiles Sdn Bhd v. TNB* [2006] 4 CLJ 892; [2006] 6 AMR 741, *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478, and *Yu-AI Food Industries Sdn Bhd v. TNB* (an unreported decision) in support of its contention.

[8] In response, counsel for the defendant urged the court not to disturb the decision of the trial judge. He argued that the authorities which favour the view that a prior prosecution and conviction was essential have been wrongly decided. He added that by stating that a prior prosecution and conviction was essential, the courts have made new law. It will be helpful if I reproduce the relevant paragraph in the defendant's further written submission in this regard:

> Therefore, what happened is that all the judges who decided that no previous conviction is required has failed to address the issue of how to interpret 'due to offence committed' and further state that a claim under section 38 of the Electricity Supply Act 1990 do not required previous conviction. Additionally, if there is a judge who decided with reason (if any), then the judge has done what is prohibited, which is judges makes law. Jurisprudentially, judges do not make law, they merely interpret the law.

[9] The defendant further argued that the s. 38(4) notice issued by the plaintiff was defective rendering the plaintiff's claim unsustainable and cited the judgment of the Court of Appeal in *Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd* [2015] 6 CLJ 751 decision in support.

[10] The plaintiff objected strenuously to the defendant raising a new point that was neither part of his pleaded case nor raised at the trial. As the validity of the notice was never challenged at the trial, no evidence was adduced to rebut the allegation that the notice relied on by the plaintiff was defective. The plaintiff stressed that no cross appeal was filed by the defendant in this regard.

A **Issues On Appeal**

[11] The issues arising from the arguments of counsel are:

(i) whether a prior prosecution and conviction is a mandatory requirement to bring a claim under s. 38(3)? or

B (ii) whether the defendant is entitled to raise the issue of whether the s. 38 (4) notice was defective?

Issue i: Whether Prior Prosecution And Conviction Was Essential To Bring A Claim Under S. 38(3)?

C **[12]** On the first issue; it is true there are conflicting High Court decisions on whether a prior prosecution and conviction is a statutory requirement under s. 38(3) of the ESA. It would be useful, if I set out s. 38:

(1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed
D under subsection 37(1), (3) or (14), the licensee or any person duly authorised by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

(1a) Notwithstanding any other provisions in this Act, where a police
E officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21a of the Common Gaming Houses Act 1953 [Act 289], the supply authority of the licensee or any person authorised by the supply authority or the licensee shall immediately disconnect or cause the supply
F of electricity to be disconnected from those premises.

(2) If the supply of electricity has been disconnected under subsection(1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection:

Provided that the period of disconnection shall not exceed three months.

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(2a) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1a), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.

(3) The licensee may require the consumer to pay him for the loss of
H revenue due to the offence committed under subsections 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by
I the licensee or any person authorised by the licensee specifying-

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof,

shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[13] The judgment of the Court of Appeal in *Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Berhad* (*supra)*, cited by the plaintiff is the most recent decision on the subject. This case was not brought to the attention of the trial judge as the judgment was only delivered by the Court of Appeal after the trial judge had delivered her decision. In *Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Berhad* (*supra)*, the Court of Appeal after reviewing all the decisions on this point held that a prior prosecution and conviction was not a prerequisite under s. 38 of the ESA. I think it apposite to mention here that the decision in *Tenaga Nasional Bhd v. Ee-Lian Plastic Industries (M) Sdn Bhd* (*supra)*, relied on by the trial judge in support of her decision was recently was also set aside by the Court of Appeal. These decisions in *Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Berhad* (*supra)* and *Tenaga Nasional Bhd v. Ee-Lian Plastic Industries (M) Sdn Bhd* (*supra)* conclude the issue in the plaintiff's favour.

Issue ii: Whether The Defendant Was Entitled To Raise The Point Based On S. 38(4)

[14] Turning to the second point; whether defendant entitled to raise the unpleaded issue that the s. 38(4) notice was defective, I note that this matter was put on record before the trial judge. In the result, the trial proceeded on the basis of the issues raised by the pleadings. It was in evidence that the s. 38(4) notice issued by the plaintiff was unsigned and that a similar notice was subsequently issued by the plaintiff's solicitors.

[15] It is settled law that it is not open to a trial judge to consider and pronounce upon issues not placed before him in the pleadings either in their original form or by way of amendment. In *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357; [2004] 1 MLJ 353, the Court of Appeal reiterated that a litigant is not entitled to put forward an unpleaded case and that a judgment should be confined to the issues raised in the pleadings. See *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196, *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, *Hj Mohamed Dom v. Sakiman* [1955] 1 LNS 26; [1956] MLJ 45 and *Hoecheong Products Co Ltd v. Cargill Hong Kong Ltd* [1995] 1 WLR 404.

[16] Applying the principle established in the above cases to the facts of the present case, it would follow that a litigant in an appeal is also bound by the rule. A litigant should not be permitted to succeed in an appeal upon a point

not raised or pleaded before the court of first instance as he is not exempted from the rules governing pleadings. This rule is also predicated on the principle of natural justice. The defendant is thus precluded by the rule against raising new issues at the appeal stage.

[17] In addition, O. 18 rr. 8(1)(a) and (b) of the Rules of Court 2012, states:

> a party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any statute of limitation, fraud or any fact showing illegality-
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> (a) which he alleges make any claim or defence of the other party not maintainable; or
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> (b) which if not specifically pleaded, might take the opposite party by surprise.

[18] In the instant appeal, the defendant took the position that the s. 38(4) notice was defective, and rendered the action unmaintainable as stated by the Court of Appeal in *Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd* (*supra*). Order 18 rr. 8(1)(a) and (b), requires this specific defence to be pleaded specifically in the statement of defence

[19] It would therefore be manifestly unjust for the defendant to succeed before me on a point not canvassed before the Sessions Court. I doubt very much whether this defence would have been successful even if it had been taken, but it is not necessary for me to make any pronouncement thereon.

[20] Accordingly, the appeal is allowed. With costs of RM20,000.